SAZ MARITIME SERVICES SDN BHD v. MUI CONTINENTAL INSURANCE BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHAMAD ARIFF YUSOF JCA
TENGKU MAIMUN JCA
[CIVIL APPEAL NO: W-02-2685-10-2011]
4 NOVEMBER 2014

CIVIL PROCEDURE: *Appeal – Appeal against judgment of High Court – Whether there was material error affecting merits of decision – Whether circumstances authorised intervention – Courts of Judicature Act 1964, s. 72*

MARITIME LAW: *Shipping law – Repairs to ship – Claim under Hull and Machinery Policy DC-S-Z4A-000180 – Appeal against dismissal – Whether condition of vessel prior to incident proven*

On 24 May 2005, a fully laden barge, Cergas 231, broke loose from its tug boat, MV Cathay 17, drifted under a strong current and rammed into two other vessels, SAZ 3 and SAZ 4, causing the vessel SAZ 4 to suffer damage. The appellant, SAZ Maritime Services Sdn Bhd, as the owner of SAZ 4, served a note of protest to the owners of Cergas 231 and MV Cathay 17 and submitted a claim notification to the respondent, MUI Continental Insurance Bhd. A joint inspection was carried out with the tug/barge's surveyors, McLarens Young International. The appellant obtained three survey reports from three different parties which were forwarded to the respondent's surveyor. The appellant then sought three quotations to repair the vessel, out of which only one company, Port Shipyard, had agreed and estimated the costs of repairs to be at RM1.5 million. On the other hand, the respondent's surveyor had appointed Sumber Samudra Sdn Bhd ('Sumber Samudra'), the original builders of SAZ 4, who estimated the costs of repairs to be RM836,216.75. The respondent rejected the appellants' claim for 'constructive total loss'. When the parties failed to reach a settlement, the appellant served a notice of abandonment on the respondent and claimed under Hull and Machinery Policy DC-S-Z4A-000180 for the sum of RM1,267,000 against the respondent but the claim was dismissed by the High Court. The appellant appealed against the same, while the respondent cross-appealed against the High Court's decision not to award costs to the respondent.

Held (dismissing appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The appellant and respondent went their separate ways due to the mutual suspicion that the appellant wanted to take advantage of the situation by bringing SAZ 4 to a condition better than it actually was and that the respondent sought to pay the least amount possible. If the parties had acted transparently and objectively to determine the condition and

value of SAZ 4 on day of the incident and the damage that needed to be repaired to bring it to the condition and value it was in immediately before the occurrence of the damage, there would be nothing that needed to proceed to litigation. (paras 14 & 15)

(2) The appellant had failed to prove the primary fact, *ie* the condition of SAZ 4 prior to the incident. Only if this could be proved would the question of what part of the damage that can be claimed under the policy arise. Argument is mere dispute, and could not replace the burden upon a plaintiff to prove its claim upon a balance of probabilities. Therefore, there was no material error affecting the merits of the decision to dismiss the appellant's claim. The circumstances did not authorise an intervention under s. 72 of the Courts of Judicature Act 1964. (paras 16 & 17)

(3) Although the appellant's claim was dismissed, the litigation was not one where one party was entirely wrong. The errors were shared and the litigation once commenced, was not conducted to determine the facts as to the merits of the claim, but engaged in an exercise of argument. Therefore, there was no material error affecting the merits of the decision not to award any costs to the respondent. (paras 18 & 19)

Bahasa Malaysia *Translation of Headnotes*

Pada 24 Mei 2005, sebuah tongkang, Cergas 231, yang penuh dengan muatan telah terlepas daripada bot tundanya, MV Cathay 17, hanyut dibawa oleh arus deras dan melanggar dua buah kapal iaitu SAZ 3 dan SAZ 4, mengakibatkan kapal SAZ 4 mengalami kerosakan. Perayu, SAZ Maritime Services Sdn Bhd, selaku pemilik SAZ 4 telah menyerahkan nota protes kepada pemilik Cergas 231 dan MV Cathay 17 dan menghantar notis tuntutan kepada responden, MUI Continental Insurance Bhd. Suatu pemeriksaan bersama telah dijalankan bersama-sama dengan juruukur bot tunda/tongkang, McLarens Young International. Perayu telah mendapatkan tiga laporan daripada juruukur yang berbeza dan laporan-laporan tersebut telah dimajukan kepada juruukur responden. Perayu telah kemudiannya meminta tiga sebut harga untuk membaiki kapal tersebut, namun begitu hanya Port Shipyard telah bersetuju untuk membaiki kapal tersebut dan menganggarkan kos sebanyak RM1.5 juta untuk kerja-kerja tersebut. Sebaliknya, juruukur responden telah melantik Sumber Samudra Sdn Bhd ('Sumber Samudra'), pembina asal SAZ 4 yang menganggarkan kos membaiki adalah sebanyak RM836,216.75. Responden telah menolak permohonan perayu untuk 'kerugian penuh konstruktif'. Apabila pihak-pihak telah gagal untuk mencapai penyelesaian, perayu telah menyerahkan notis pengabaian terhadap responden dan membuat permohonan di bawah Hull & Machinery Policy DC-S-Z4A-000180 untuk jumlah sebanyak RM1,267,000 terhadap responden tetapi telah ditolak oleh Mahkamah Tinggi. Perayu merayu terhadap keputusan tersebut dan responden telah membuat rayuan balas terhadap keputusan Mahkamah Tinggi kerana tidak mengawardkan kos kepada responden.

Keputusan (menolak rayuan dengan kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Perayu dan responden telah mengikut haluan masing-masing disebabkan oleh perasaan sangsi terhadap satu sama lain, bahawa perayu berniat mengambil kesempatan terhadap situasi tersebut dengan membaiki SAZ 4 kepada keadaan yang lebih baik daripada keadaan sebenarnya dan responden pula ingin membayar jumlah sesedikit mungkin. Jika pihak-pihak telah bertindak secara telus dan objektif untuk menentukan keadaan dan nilai SAZ 4 pada hari kejadian tersebut dan kerosakan yang perlu dibaiki untuk memulihkannya kepada keadaan sebelum kerosakan tersebut terjadi, maka tiada apa-apa yang perlu dihadapkan untuk litigasi.

(2) Perayu telah gagal untuk membuktikan fakta utama iaitu keadaan SAZ 4 sebelum kejadian tersebut. Hanya dengan pembuktian fakta tersebut akan timbul persoalan tentang kerosakan manakah yang boleh dituntut di bawah polisi. Penghujahan hanyalah pertikaian, dan tidak boleh menggantikan beban ke atas plaintif untuk membuktikan tuntutannya atas imbangan kebarangkalian. Justeru, tiada kekhilafan material yang telah menjejaskan merit keputusan untuk menolak tuntutan perayu. Keadaan tidak memberikan kuasa untuk campur tangan di bawah s. 72 Akta Mahkamah Kehakiman 1964.

(3) Walaupun tuntutan perayu telah ditolak, litigasi tersebut bukanlah suatu litigasi di mana salah satu daripada pihak-pihak bersalah sepenuhnya. Kesalahan dikongsi sama rata antara mereka dan litigasi yang telah dimulakan tidak dijalankan untuk menentukan fakta berkaitan merit tuntutan tersebut, tetapi dijalankan secara pertukaran hujahan. Justeru, tiada kekhilafan material yang telah menjejaskan merit keputusan untuk tidak mengawardkan responden dengan kos.

Legislation referred to:
Civil Law Act 1956, s. 5
Courts of Judicature Act 1964, s. 72

Marine Insurance Act 1906 [UK], ss. 60(2)(ii), 61

For the appellant - Jeremy M Joseph (Jennifer James & Syed Tahir Syed Azman with him); M/s Joseph & Partners
For the respondent - Philip Teoh; M/s Philip Teoh & Co

[Editor's note: For the High Court judgment, please see SAZ Maritime Services Sdn Bhd v. MUI Continental Insurance Berhad [2011] 1 LNS 1140.]

Reported by Lyana Shohaimay

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JUDGMENT

Abdul Wahab Patail JCA:

[1] The plaintiff SAZ Maritime Services Sdn Bhd ("the appellant") appealed against the dismissal by the High Court of its claim under a Marine
B Policy, Hull & Machinery Policy DC-S-Z4A-000180 ("the policy") for a sum of RM1,267,000.

[2] The defendant MUl Continental Insurance Berhad ("the respondent") had cross-appealed against the decision not to award costs to the respondent notwithstanding that the claim by the appellant was dismissed after a full
C trial.

Brief Facts

[3] In the early hours of 24 May 2005, a fully laden barge, "Cergas 231", broke loose from its tug boat "MV Cathay 17", drifted under a strong current
D and rammed into the vessels "SAZ 3" and "SAZ 4" that were safely moored and secured alongside Port Shipyard & Engineering Sdn Bhd ("Port Shipyard").

[4] The damage suffered by the vessel "SAZ 4" included damage amidships with the bow torn off and extensive fracturing of the main deck;
E and the starboard side skin cracked with internal fractures and broken between frames 17 and 22.

[5] Having served a note of protest on the owners of the tug, "MV Cathay 17" and the barge, "Cergas 231" on 26 May 2005, the appellant submitted a claim notification to the respondent on 26 October 2005.

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[6] A joint inspection was carried out together with the tug/barge's surveyors, McLarens Young International on 6 December 2005.

[7] The appellant obtained three survey reports as follows:

G (a) Preliminary report of inspection dated 21 December 2005 by Sea Quest Technology Pte Ltd upon an inspection on 10 October 2005;

(b) Damage report dated 23 December 2005 by ISD & Associates Sdn Bhd upon inspection between 12 December 2005 and 15 December 2005;

(c) Survey report dated 7 April 2006 by the Classification Society, Det
H Norske Veritas ("DNV") upon an inspection on the same date.

[8] The survey reports were forwarded to Maphilindo Insight Sdn Bhd ("respondent's surveyor") on 8 May 2006.

[9] The appellant sought three quotations for repairs. Two, Asia Slipway
I and Fadara Yacht declined. Only Port Shipyard agreed and estimated the costs of repair at RM1.5 million.

[10] The respondent's surveyor, appointed Sumber Samudra Sdn Bhd ("Sumber Samudra"), the original builders of SAZ 4 who estimated the costs of repair at RM836,216.75.

[11] *Vide* a letter dated 10 January 2007, the respondent rejected the appellant's claim for "constructive total loss". The parties being unable to come to a settlement, the appellant served on the respondent a notice of abandonment on 23 March 2009.

The Issues On Appeal

[12] The submission for the appellant proceeded along the following lines:

The First Issue:

(a) The issue has to do with the merits of the case, specifically, whether the High Court carefully and judicially evaluated and appreciated the facts, the evidence and the documents;

(b) Whether there is a constructive total loss claim with constructive total loss according to ss. 60 and 61 of the Marine Insurance Act 1906 of the United Kingdom ("MIA") and made applicable to Malaysia under s. 5 of the Civil Law Act 1956;

(c) Why the revised quotation by Sumber Samudra estimating repair costs as exceeding RM1.3 million should be adopted?

(d) As stated in s. 60(2)(ii) of MIA 1906 there is a constructive total loss if the cost of repairing the damage would exceed the value of the ship when repaired;

(e) That the replacement of the hull is not a relevant question in establishing constructive total loss;

(f) The High Court fell into error when it held it suffices "... to ensure it is built according to the requirements and standards sufficient to correspond with her original character, notwithstanding that the repairs will mean additional weight to the hull";

(g) The appellant had discharged its burden in proving a constructive total loss claim by submitting the Port Shipyard's quotation as well as the revised quotation from Sumber Samudra. The burden thereafter lay on the respondent as the insurer to counter the quotations/reports with a quotation/report to show that the costs of repair would be lower than the insured value, which the respondent has failed to show to date and hence, the respondent should rightfully accept the claim for constructive total loss under the marine policy.

A The Second Issue:

(a) The High Court erred when it held that the respondent has a complete defence as a result of the alleged appellant's breach of the sue and labour clause when the learned judge held that "It is clear from evidence of PW1 that the plaintiff had failed to take positive steps and/or efforts to minimise the loss by claiming against the tortfeasors. It is trite that the breach of the duty of the assured provides the insurer a full defence".

Conclusion

(a) The High Court failed to appreciate the contemporaneous, documentary evidence, and in particular, in respect to the efforts taken by the appellant to ensure that its claim for constructive total loss is satisfied, and in particular failed to appreciate:

(i) All three survey reports unequivocally state that SAZ 4 is not seaworthy and it will be very difficult, if not, almost impossible, to restore SAZ 4 back to its original position;

(ii) The first quotation by Sumber Samudra was grossly underestimated as it did not reflect the actual repair works required to put SAZ 4 back into its original character since it did not take into account the DNV standard code of repair which would ultimately alter the stability and purpose SAZ4 was originally built for;

(iii) The costs of repair in the first quotation for the sum of RM826,216.57 is merely an estimation since there was no approval given by the Classification Society as to the repair procedure suggested therein;

(iv) That when the first quotation was prepared, Sumber Samudra had no access to the DNV report. It was only on 12 February 2007, did Sumber Samudra clearly understand the extent of work involved in restoring SAZ 4 and accordingly revised the quotation;

(v) The letter dated 28 December 2006 by Sumber Samudra does not clarify the first quotation as alleged by the respondent during the trial as it answers queries pertaining to a letter dated 12 December 2006 that was never tendered by the respondent as evidence into court;

(vi) The issue of bank guarantee was never pleaded or ventured into by either parties and in any event, is irrelevant in establishing constructive total loss; and

(vii) That there was a breach of the sue and labour clause when there was no evidence tendered to show that a reasonable, prudent uninsured in the position of the appellant would have acted differently. Even if valid, the respondent's complaint regarding the appellant's inadequate attempts to mitigate its loss could not be arguably categorised as the proximate cause of the loss.

[13] This court dismissed the appeal and the cross-appeal for the following reasons:

(a) There was no evidence of the condition of SAZ 4 in the early hours of 24 May 2005, for that is the "original condition" and not the condition when new that the repairs are to restore SAZ 4 to;

(b) There is no evidence of the value of SAZ 4 in the early hours of 24 May 2005;

(c) There is no evidence that in the early hours of 24 May 2005, SAZ 4 fulfilled the DNV Classification criteria;

(d) There was no reason why the appellant did not itself seek a quotation for repairs by Sumber Samudra who had built SAZ 4; and

(e) The three reports obtained by the appellant should be made available to whoever a quotation for repairs is sought from, and who should have a joint inspection together with the appellant, the respondent's surveyor and DNV, so that the quotation is obtained on the basis of what is necessary to be done.

[14] As it happened, parties went separate ways, and the mutual suspicion that the appellant wants to take advantage to bring SAZ 4 to a condition better than it actually was, or the respondent seeking to pay the least amount possible.

[15] If the parties had acted transparently and objectively to determine the condition and value of SAZ 4 in the early hours of 24 May 2005, and then what was the damage that needed to be repaired to bring it to the condition and value it was in immediately before the occurrence of the damage, there would be nothing that need to proceed to litigation. That is because once the cost of repairs recoverable under the policy is determined, SAZ 4 could be repaired, or the appellant could abandon SAZ 4 and use the proceeds to build a new vessel.

[16] The failure to proceed in an objective and practical manner led to litigation which must necessarily fail if the primary facts, what it would cost to bring SAZ 4 to the condition it was in the early hours of 24 May 2005 cannot be proved. Only if it could be proved would the associated question of what part of the damage can be claimed against the policy arise. Argument

A is mere dispute, and cannot replace the burden upon a plaintiff to prove its claim upon a balance of probabilities.

[17] For the foregoing reasons, we concluded there was no material error affecting the merits of the decision to dismiss the claim by the appellant. Section 72 of the Courts of Judicature Act 1964 (Act 91) does not authorise
B intervention in the circumstances.

[18] Although the appellant's claim was dismissed, the litigation was not one where one party was entirely wrong. The errors were shared and the litigation once commenced was not conducted to determine the facts as to the
C merits of the claim, but engaged in an exercise of argument.

[19] Accordingly, we concluded there was no material error affecting the merits of the decision not to award any costs to the respondent.

[20] We, therefore, dismissed the appeal as well as the cross-appeal. Given that the main bulk of submissions is on the appellant's appeal, we award net
D costs to the respondent in the sum of RM10,000 and order the deposits to be refunded.

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